Supreme Court of the United States,

OCTOBER TERM, 1913.—No. 55.

CLIFFORD G. LUDVIGH, as Trustee in Bankruptcy of the estate and effects of Philip Horowitz and Joseph Horowitz, individually and as copartners, etc.,

Appellant,

AGAINST

AMERICAN WOOLEN COMPANY OF NEW YORK and the NIAGARA WOOLEN COMPANY,

Appellees.

BRIEF FOR APPELLEES.

This is an appeal from a judgment of the Circuit Court of Appeals for the Second Circuit, reversing a judgment of the District Court for the Southern District of New York in favor of the appellant and against the appellee for the sum of $52,668.19 (p. 229).

The action was brought by the appellant, as trustee in bankruptcy of the firm of Horowitz Bros. and of the individuals composing said firm, to recover certain property claimed to have been received by the appellee, American Woolen Company of New York, pursuant to a scheme entered into between it and the bankrupts to hinder, delay and defraud the creditors of the latter.

The bill of complaint (pp. 2–25) is framed upon the theory that the appellee, American Woolen Com-

pany of New York (hereinafter called the "Woolen Company") and the bankrupts secretly entered into a fraudulent scheme to defraud the creditors of the said bankrupts, by forming a "dummy" corporation, the appellee Niagara Woolen Company (hereinafter called the "Niagara Company") and making paper agreements which in fact were not and were not intended to be carried out, and that the purpose and object of such fraudulent scheme was to present and extend to all creditors of the bankrupts, both existing and subsequent, an apparent ownership on the part of the bankrupts of the woolens supplied by the Woolen Company, in order that, on the faith of such ostensible ownership, the creditors would be induced to continue extending credit to the bankrupts as before.

That, pursuant to such scheme, the bankrupts made sales and collections in their own name.

That the proceeds of sales were intended to belong to the bankrupts and that they deposited them in their own bank account.

The demurrer to the bill was overruled upon the supposition that the appellant would prove the allegations above referred to.

> See Opinion, Judge Hough, *Ludvigh* vs. *American Woolen Co.*, 159 Fed., 796.

At the trial, the appellant did not prove any actual fraud as alleged in the bill of complaint. He recovered on the theory that the transactions, though honestly intended, were fraudulent at law (pp. 204-215). The Circuit Court of Appeals reversed the judgment by a vote of two to one (p. 228).

Both courts were unanimous in finding that the parties acted in good faith, and that the motives of the Woolen Company in entering into the agreements and conducting the business are unimpeachable (pp. 211, 224).

The appellant in his brief recognizes the binding force of this finding, in that he does not question it

by express words. It seems to us, however, that he has nevertheless endeavored, by the manner in which he has edited his brief, to create an impression that the appellees did not act in good faith. He has made statements insinuating that the appellees' motives were fraudulent.

Instead of answering each of the insinuations contained in appellant's brief, we shall at the outset call the court's attention to the unanimous finding of the courts below on the question of the honesty of the Woolen Company's motives.

The learned Judge who tried the case, and who found in favor of the appellant, stated in his opinion:

> "It may be admitted, and is found, that there was no actual fraud on the part of anyone in the sense either of suppression of truth or suggestion of false practice upon creditors" (p. 211).

He also found (pp. 210, 211) that:

> "The bill of complaint correctly alleges the main features of the plan above set forth, but it also asserts (in substance) that with the knowledge and connivance of the defendants, and especially of the officers and agents of the Woolen Company, that Horowitz & Son sold the 'consigned goods in their own name and rendered bills in their own name and made collections accordingly,' and that in most instances the proceeds of such sale were placed by the bankrupts 'in their own bank account,' so that, in effect, the bill charges that however legally good *inter partes* the paper scheme was, it was also from the beginning or nearly so practically disregarded, and is now used and was always intended to be used only as a protection in time of need; while ordinarily the Horowitz firm, with the knowledge and consent of the Woolen Company, transacted their business, sold goods, and made collections therefor, exactly as if they had bought all the goods in their store for cash or credit in the ordinary way. This, as above sufficiently indicated, I do not believe to be

> true. *There is no evidence of any actual fraud on the part of the Woolen Company;* on the contrary, the evidence is clear that that corporation, acting under the advice of counsel, perfected this plan in order to avoid suspected dangers in doing business with Philip Horowitz. The plan was believed to be lawful, and was honestly adhered to until within a short time of failure, when Philip Horowitz more than justified suspicion by flagrantly violating his own agreements and becoming a fugitive from his creditors."

At page 210, he said:

> "There is nothing in the oral evidence to persuade me that down to about May, 1904, there was any departure either from the letter or the spirit of the written agreements first above set forth."

The majority of the learned Circuit Court of Appeals and the learned Justice who dissented, agreed with the finding of the trial Judge, that the testimony in the case showed that the motive of the Woolen Company was honest, and that there was no evidence of any fraud in fact (p. 224). The only question thus left for discussion is whether the arrangement between the parties was fraudulent as a matter of law. This brings us to a statement of the facts.

Facts.

The American Woolen Company, shortly after its organization in the year 1901, began selling goods to the bankrupts (p. 59). On November 15th, 1901, it entered into a written consignment agreement with the bankrupts (Plaintiff's Exhibit 1, pp. 141, 142). All business between the parties for one year was to be subject thereto. The Woolen Company was to consign goods to the bankrupts. All bills for consigned goods were made payable directly to the Woolen Company. The bankrupts were to give

security by way of a lien on real estate, to protect the Woolen Company from loss which might be suffered by reason of their failure to observe the agreement (p. 141).

The dealings were, thereafter, had under the agreement. All bills for sales, made by Horowitz & Son to their customers, had printed thereon, in red ink, a statement that the amount was payable direct to the American Woolen Company of New York (p. 205).

In the year 1902 and shortly before the expiration of the aforesaid contract, the Woolen Company and its attorneys decided it advisable to enter into a different arrangement, and proceeded to form the Niagara Woolen Company and to enter into the agreements with it and the Horowitzes, which will be hereinafter fully discussed.

The object of the new arrangement was to more fully secure the title to the goods in the Woolen Company and the payment of the proceeds of sale to them, or as stated by the trial Judge, "to avoid suspected dangers in doing business with Philip Horowitz" (p. 211). This will be apparent as the details of the new plan of doing business are outlined. The change was not made, as stated by appellant in his brief, "to circumvent the decision *In re Garcewich*, 115 Fed., 87." There is nothing in the record to support the appellant's statement, except the words which the appellant's counsel, by his form of questions, attempted without success to put in the mouth of the witness Gallert (p. 48).

Under the Garcewich case, the old way of doing business was valid. Both the courts below seem to recognize this (pp. 205, 224). Furthermore, as stated above, both the courts below agree that the Woolen Company, in adopting the new arrangement, acted in good faith and without intention of doing anything wrong. It is evident that the Woolen Company in making the new arrangement intended so to change the actual situation of the parties that its title to the goods and the proceeds

thereof would be in no way at the disposition of the Horowitz's, and that it was not "attempting to circumvent any decision." Had the plan, under which the parties were dealing been considered as illegal, it would have been perfectly proper for them to change it as they did without being subject to any criticism, so long as the new plan was not intended to defraud creditors. And that it was not so intended has been expressly found in this case.

The Niagara Woolen Company was legally incorporated in November, 1902 (p. 41). It had a capital stock of $20,000, which was paid—$500 in cash, $100 each being contributed by two employees of the Woolen Company, Mr. Joseph Horowitz contributing the other $300. Philip Horowitz executed a mortgage to the Niagara Woolen Company for $19,500, covering premises Nos. 54-56 Eldridge Street, in The City of New York, in return for the remaining 195 shares (p. 41). The certificate of incorporation stated that the object of the corporation was to contract and deal with the American Woolen Company of New York and deal in fabrics received therefrom (p. 153). The Woolen Company retained to a large extent control over the Niagara Company. George H. Dane and Robert Hanlon, two employees of the Woolen Company, were designated as two of the three directors (p. 41); 197 shares of stock were pledged by Joseph Horowitz with Mr. Murphy, an employee of the Woolen Company, to secure the performance of the agreements hereinafter referred to (pp. 41, 15). Joseph Horowitz was made a director and president, and Thomas E. Dawber, another employee of the Woolen Company, was made secretary and treasurer (p. 41). The by-laws were carefully drawn that all monies were to be paid over to the treasurer and deposited in a Bank account in the name of the Corporation and that no money could be withdrawn except by the joint signature of the president and the treasurer (p. 157).

When the organization of the Niagara Woolen

Company was complete, a contract was at once entered into between it and the Woolen Company, which, in legal effect, was substantially the same as the consignment contract between the Woolen Company and the bankrupts then in force (pp. 13-15, 141, 142). There is, however, this essential difference:

The Woolen Company wanted to make it impossible for the bankrupts to in any way impair its title to the merchandise or its proceeds.

It evidently had less faith in their honesty than in their business ability, and that this lack of faith was justified, and the new arrangement necessary for the protection of the Woolen Company is shown by the subsequent dishonesty of Philip Horowitz.

It therefore organized a new corporation the "Niagara Woolen Company" which it controlled, with whom it made its contract, and to which al proceeds of sales were to be paid

This contract between the Woolen Company and the Niagara Company (pp.13-15) will be fully discussed hereinafter. Its essential features were: All merchandise delivered to the Niagara Company was to remain the property of the Woolen Company, to be subject to its control. Title was to pass directly from the Woolen Company to the purchasers. Goods were to be insured for the benefit of the Woolen Company. The Niagara Company was to sell the goods and turn over the proceeds of the sale, retaining whatever it realized over the invoice price, after deducting the usual discount. The Niagara Company guaranteed the accounts. The agreement was for a year, and on its termination the Woolen Company was to take back all unsold goods.

In order further to protect the Woolen Company, Phillip Horowitz & Son entered into an agreement with the Woolen Company and Mr. Murphy, Manager of the Woolen Company (pp. 15–18), by which they guaranteed the performance of the new ar-

rangement between the Niagara Company and the Woolen Company, and, as security for the agreement, transferred to Mr. Murphy, as trustee for the Woolen Company, 197 shares of the stock of the Niagara Company. Philip Horowitz also entered into an agreement with the Niagara Company, by which he agreed to pay the expenses of the business of the Niagara Company, in consideration of $1,200 to be paid him monthly out of the earnings of that corporation (pp. 18-20).

The Niagara Company had its office in the same place where Philip Horowitz & Son conducted their other business, which was largely the sale of silks (p. 105). A sign with the Niagara's name upon it was placed outside in addition to the sign of Philip Horowitz & Son (pp. 63, 83). The learned Judge found the sign was "reasonably conspicuous" (p. 208). In the back of the Horowitzes' store were three offices partitioned off. One of these was the office of the Niagara Woolen Company (p. 61). There, the books of the company were kept and the bookkeeper, Mr. Hartough, who was employed by the Woolen Company in behalf of the Niagara Company shortly after its formation, was located (p. 11). When goods were received for the Niagara Company from the Woolen Company, they were placed in the store.

The appellant devotes considerable space in his brief to showing that the goods consigned to the Niagara Company were mingled with the goods of Philip Horowitz & Son. It seems to us to be of little importance whether or not they were mingled, in view of the fact that there is no evidence that any creditor was misled thereby. Furthermore, it is apparent that the mingling was, to a large extent, without the knowledge of the Woolen Company. The testimony of Mr. Dawber, the treasurer of the Niagara Company, shows that all these goods were tagged with the tags of the Woolen Company (p. 106), and that the stock of silks of Philip Horowitz & Son was kept separate from the woolens (p. 105). Presumably, there were no other woolens there except

those of the Woolen Company, for, under the previous agreement between Horowitz and the Woolen Company, he had agreed not to purchase woolens elsewhere than from the Woolen Company (p. 142), and in the new arrangement with the Niagara Company, as pointed out by counsel for appellant, a similar provision was inserted (p. 14). Therefore although the witness Horowitz testifies that there were other woolens there besides those of the Woolen Company, there is nothing to show that the Woolen Company knew of this fact, and as far as Mr. Dawber could see, one side of the store was devoted to the woolens and the other side to the silks (p. 105). The fact that, on cross-examination, he could not say positively what was in the case or what tags were on every piece of goods is of little importance. As far as the Woolen Company knew, the woolens were kept separate from the silks and only its woolens were there.

The goods, consigned to the Niagara Company, were naturally sold by Mr. Horowitz, who was the president of the Niagara Company, and others acting in his behalf. This was the written arrangement. It is not accurate, however, to state, as does appellant's counsel, that there was no change in the method of doing business after the Niagara Company was formed, for, though the Horowitzes acted as salesmen, *it is undisputed that the goods were sold and billed in the name of the Niagara Woolen Company and the checks in payment thereof, with few exceptions, were made payable to the order of the Niagara Woolen Company* (p. 209). *They were deposited in the account of the Niagara Woolen Company* (pp. 119, 209). Any checks not payable to the Niagara Woolen Company, which were for goods sold by the Niagara Company, were at once endorsed over to the Niagara Company and deposited in its account (p. 76). This method of doing business was not departed from until the Horowitzes began to steal the checks and deposit them to their personal account, which, of course, was without

the knowledge and consent of the Woolen Company, as is evident from the testimony and is adjudicated by the judgment in the case of *Niagara Woolen Company* vs. *Pacific Bank* (Exhibit Y, pp. 179-203).

The goods, shipped to the Niagara Company by the Woolen Company, were billed upon the ordinary billhead of the Woolen Company (p. 23), but contained a statement plainly written thereon:

> "*These goods are delivered on consignment by the American Woolen Company of New York and are accepted by the Niagara Woolen Company upon the express condition that the title thereto remains vested in the American Woolen Company of New York until paid for*" (p. 23),

and the so-called orders for goods had written upon them:

> "*This is accepted and consideration shall be given in accordance with the agreement between us as of November 25th, 1902*" (p. 145).

Appellant's counsel makes considerable point of the other terms which were printed upon these bills and orders. The matter will be taken up more fully hereinafter. We merely wish, at this point, to call the Court's attention to the fact that the ordinary printed invoices were used, but that the terms applicable to absolute sales were not intended to apply, is evident from the special statements above quoted which were typewritten upon the bills and orders, so as to make them apply to this particular method of doing business.

The goods were billed to the Niagara Company at a certain price at which the Niagara Company was authorized to sell the same. They were not to sell for less than this price (p. 68). Certain discounts were allowed to the Niagara Company, these discounts being computed according to the time within which it turned over the proceeds of sale

which it collected as agent or consignee of the Woolen Company (pp. 14, 19).

The reference to the discounts in Exhibit "A" of the complaint is explained by an amendment to the agreement appearing at page 18 of the record, which settled the alleged controversy as to discount and which shows that the discounts, allowed under the agreement, were to depend, as above stated, upon the time within which the Niagara Company turned over the moneys to the Woolen Company. Had the contract been one of sale, the discount would have been figured from the time of the delivery of the goods to the Niagara Company, and not from the time of the sale.

The agreement in regard to "off-price" goods, which is claimed by appellant to be inconsistent with the consignment, is an agreement in regard to some of the special goods, called "seconds," which the Woolen Company did not wish to consign, as they might depreciate during a period of their consignment, and, therefore, before consigning them, they made Horowitz guarantee the Woolen Company from loss in case they were not sold and it had to take back the goods (p. 148).

The Woolen Company not only protected itself as aforesaid by having control of the board of directors of the Niagara Company, but, after business was commenced, kept a watchful eye over the affairs of the Niagara Company. Mr. Dawber, the Secretary and Treasurer of the Niagara Company, and an employee of the Woolen Company, called daily at the place of business of the Niagara Company and spent a short while glancing over the affairs of the company (101). Shortly after the company's organization, Mr. Hartough was employed by the Woolen Company as bookkeeper of the Niagara Company and was at the office of the Niagara Company daily, spending his entire time keeping the books of the Niagara Company (pp. 101, 117). Mr. Hartough, the bookkeeper, made monthly reports to the Woolen Company of the Niagara sales (p. 120),

and the auditors of the Woolen Company called once every month or two and went over the books of the Woolen Company (p. 120).

Counsel for appellant in his brief attempts to have it appear that the bookkeeper and auditors depended entirely upon the Horowitzes for their information. While this is naturally true to an extent, as Philip Horowitz was the president of the Niagara Company and had charge of making sales, still the bookkeeper and the Treasurer were there daily, acting in the interests of the Woolen Company, and must neces-arily have seen what was going on and have had general first hand knowledge of the transaction. In addition to this, the bookkeeper saw the checks, as they came in, and was thus enabled to keep track of the transactions (p. 118). Furthermore, the Woolen Company, twice during the period, had an inventory of the merchandise taken, thus checking up the reports of sales made by the Horowitzes (p. 129).

The proceeds of sale of the merchandise delivered to the Niagara Company (except what was stolen after May, 1904, by Philip Horowitz) came into the possession of the Niagara's Treasurer and were deposited in the Niagara Company's bank account (pp. 76, 77). Not one penny thereof went to either of the Horowitzes. They were paid the $1,200 per month out of the earnings of the Niagara in accordance with the agreement (p. 209). This $1,200 was only paid when there were earnings; when the earnings stopped the payment ceased (pp. 209, 77).

The company was conducted as any other corporation. It had its regular meetings. It is true Philip Horowitz testifies that he never attended a meeting. However, he is contradicted in this by the minutes which are offered in evidence (Defendants' Exhibits D to T, pp. 159-178), and which were testified to by Mr. Dawber, the Secretary of the Niagara Company, as correct (p. 107).

In October, 1904, the Woolen Company, acting under its contract, took back goods of the value of

$39,685.27, which it had delivered to the Niagara Company (p. 42). This action is brought to recover the value of said goods with interest, which at the time of the entry of the judgment in the District Court amounted to $12,798.50, making the total amount of the judgment $52,668.19.

The appellant in his brief attempts to show that the Woolen Company made a profit on the transaction, by reason of the fact that it realized $12,500 on a mortgage made to the Niagara Company. The fact, that it realized on this mortgage is immaterial, and the statements of the appellant in regard thereto are unfair, as are also the statements in regard to the recovery of the Niagara Company from the Pacific Bank. The Niagara Company merely recovered part of the amount, which had been stolen from it by the Niagara Company. How much else was stolen by the Horowitzes does not appear, nor does it appear what the state of the account between the Niagara Company and the Woolen Company was at the time of the failure, or whether the Woolen Company was made whole by retaking the goods. If it received more than it was entitled to, the same can be recovered in a proper action.

The learned trial Judge directed a judgment in favor of the appellant (pp. 204–215). He found, however, as above stated, *that the transactions were free from any actual fraud, and that the agreements entered into between the parties were honestly intended and honestly lived up to.* He decided, however, that, as a matter of law, the arrangement was not a consignment to the Niagara Woolen Company, but an absolute sale to Philip Horowitz & Son; that the Niagara Company could be disregarded. As he said, it was but another name for the American Woolen Company (p. 214).

It will be noted, on the other hand, that counsel for appellant disagrees with the learned Judge, in that he contends it was but another name for Philip Horowitz & Son.

The majority of Circuit Court of Appeals dis-

agreed with the learned trial Judge in the construction of the agreement between the Niagara Company and the Woolen Company (pp. 224–227). They considered it a valid consignment agreement, and further held that it was immaterial whether it was a consignment or a conditional sale. The clear intent was to keep the title in the Woolen Company, and there was nothing in the arrangement which was fraudulent in fact or in law.

The contention of the appellee is that the whole purpose and intent of the arrangement between the parties was to secure the American Woolen Company in its title to the goods and the proceeds of sale.

That as such purpose and intent was not conceived in or based upon any *fraud* in fact, it should be enforced unless to do so would violate some principle of law.

That no principle of law is violated and that the title to the goods received by the Woolen Company from the Niagara Company, and to recover which this suit is brought, was at all times vested in the Woolen Company.

That the Niagara Company was a separate entity with which the Woolen Company contracted and to which it delivered the goods; and that in taking back such goods from the Niagara it exercised rights which did not in any way affect the creditors of Horowitz & Son.

POINT I.

The merchandise in question was delivered to the Niagara Company merely on consignment. The title thereto never passed out of the Woolen Company.

The Construction of the Agreement.

Judge Hough found at page 210:

> "There is nothing in the oral evidence to persuade me that down to about May, 1904, there was any departure either from the letter or the spirit of the written agreements first above set forth."

The departure, after May, 1904, was the theft of certain checks by the Horowitzes without the knowledge of the Woolen Company (p. 219; see also Defendants' Exhibit Y, pp. 179–203).

We can best judge of the transaction by examining the agreement itself. It is, in fact, necessary to construe it and determine its meaning before we can intelligently discuss, whether or not the transaction had the elements of a sale or a factorage agreement.

The agreement (pp. 12–14) was entered into on November 25th, 1902. Under it the Woolen Company agreed to deliver to the Niagara Company from time to time such merchandise as it, in its judgment, saw fit, and the Niagara Company agreed to accept possession of such merchandise upon the following terms:

1. The Niagara Company was to hold and care for same as the property of the Woolen Company, it being expressly understood and agreed that the title to the said merchandise and its proceeds should always be vested in the Woolen Company, that

such merchandise should at all times be subject to and under the direction and control of the Woolen Company, and that title thereto should pass directly from the Woolen Company to the person or persons to whom the same were sold, in the manner and upon the terms contained in said agreement; the Niagara Company agreed to keep the merchandise insured for the benefit of the Woolen Company; the Niarara Company further agreed to sell such merchandise to such persons as it should judge to be of good credit and business standing, and to collect, for and in behalf of the Woolen Company, all bills and accounts for the merchandise so sold, and to pay over immediately any amount so collected, minus the difference between the price at which the merchandise so collected for was invoiced to the Niagara Company, and the price at which it had been sold by the company. The Niagara Company guaranteed the payment of all bills and accounts for merchandise, possession of which was delivered to it under the said agreement, and further agreed, in case any merchandise delivered under the provisions of the said agreement by the Woolen Company to the Niagara Company should not be accounted for in accordance with the provisions of clause IV of the agreement, to pay the Woolen Company the invoice price of such merchandise, and, thereupon, title to said merchandise or to the proceeds thereof, so paid, should pass to the Niagara Company, and be exempted from the provisions of said agreement. It was further provided, that the invoices, given by the Woolen Company to the Niagara Company, were subject to the usual trade discounts of the Woolen Company.

This clause is explained by the supplemental agreement which will be discussed hereinafter.

The agreement was to continue for one year. If for any reason it should terminate, all merchandise, possession of which was held by the Niagara Company under the agreement, was, immediately upon

the termination of the agreement, to be returned to the possession of the Woolen Company.

In November, 1903, said agreement was modified and, as modified, renewed for a year (pp. 18–20). Under the modification, the Niagara Company was to render the Woolen Company monthly accounts of the sales made by it under the agreement, and it was further understood that all prices referred to in paragraph IV of the first agreement should be subject to a discount of 8 per cent., if the Niagara Company turned the amount of the invoices over to the Woolen Company within sixty days from the sale, by the Niagara Company, of the merchandise covered by such invoices, and such invoice prices were subject in that event to a further discount of 2 per cent. after the 8 per cent. discount had been deducted. It was further provided, that on the invoices, the amount of which was not turned over to the Woolen Company within thirty days from the sale of the merchandise, covered by said invoices, the Niagara Company agreed to pay interest at the rate of 6 per cent. after the expiration of sixty days from the sale of said merchandise by the Niagara Company.

It is clear from a reading of the said agreements, that the *Woolen Company never intended to permit the title to this merchandise to pass from it to the Niagara Company or to any one, except a bona fide purchaser of the merchandise from the Niagara Company*, in which event, the title was to pass directly from the Woolen Company to such purchaser, and the Niagara Company became the agent or factor of the Woolen Company to collect for and in its behalf all bills of accounts for the merchandise so sold and immediately to pay over to the Woolen Company the amount collected.

The Niagara Company was never liable to pay for merchandise, which it did not sell, as the so-called terms of credit only dated from the *time of sale by the Niagara Company* and as at the end of the year the Woolen Company had to take back all unsold

merchandise. The eighth paragraph of the agreement contained a clear provision that if for any reason the agreement should terminate, all merchandise, possession of which was held by the Niagara Company under the agreement, should be immediately returned to the possession of the Woolen Company.

The learned Judge who tried this cause, in his opinion (p. 206), made a comment upon and gave his construction to the Fifth paragraph of the agreement. He said:

> "It is to be observed that this document requires the Niagara Company to pay the invoice price of the merchandise delivered to it unless it accounts for the same 'under the provisions of Clause 4', but Clause 4 contains, as above set forth, a specific agreement on the part of the Niagara Company to sell the merchandise and pay over to the Woolen Company the sale price thereof, less the difference between such price and the invoice value. It follows that if the Niagara Company could account to the Woolen Company for money by selling the goods, it was nevertheless bound to pay the invoice price and (continues the written agreement) 'thereupon title to said merchandise * * * so paid for shall pass to' the Woolen Company." (This is a clerical mistake of the Judge. He meant "shall pass to the Niagara Company".)

At page 212 the learned Judge further construed the agreement by stating that

> "It is apparent, that in substance and effect, Horowitz & Son were obliged to pay the invoice price for every yard of goods delivered to the Niagara Company, sooner or later, whether the merchandise was sold or not, and even if it were burned or stolen, the Woolen Company was entitled to sue both father and son for such invoice price, or any deficiency thereof."

Upon this construction of the agreement chiefly the learned Judge bases his decision that the trans-

action was a sale and not a consignment. The appellant, in his brief, follows the same reasoning and attempts to justify the opinion of the learned Trial Judge and to show that the majority of the Circuit Court of Appeals were in error when they differed with the Trial Judge upon the construction of the agreement.

By the first portion of paragraph 5 of the agreement the Niagara Company guaranteed payment of all bills and accounts for merchandise, the possession of which is delivered to it under the agreement. Inasmuch as the words "bills and accounts" occur in the preceding paragraph (number 4) of the agreement and nowhere else in the agreement, this guaranty relates to bills and accounts for merchandise sold by the Niagara Company to its customers.

By the subsequent language of paragraph 5, the Niagara Company agreed that if any merchandise were not "accounted for" to the Woolen Company under the provisions of Clause 4, it would pay to the Woolen Company the invoice price of such merchandise, and thereupon title to the said merchandise or the proceeds thereof should pass to the Niagara Company and be exempted from the provisions of the agreement. The only accounting which was called for by Clause 4 was that the Niagara Company should collect, on behalf of the Woolen Company, all bills and accounts for merchandise sold and immediately pay the same over to the Woolen Company. In case it did not account in this manner, then title to the merchandise, as well as to the proceeds, was to pass to the Niagara Company upon payment of the invoice price of such merchandise; that is, the Niagara Company, on making good its default, became vested with all the rights of the Woolen Company in and to such goods or their proceeds.

The only reasonable construction that can be given to this clause is that, the only accounting called for thereby, was as to the proceeds of goods

sold. Goods, on hand, were accounted for by that fact, itself.

This was a condition precedent to acquiring title.

The construction, given to this clause by the learned Trial Judge, that the Niagara Company, if it did not account to the Woolen Company by selling the goods, was nevertheless bound to pay the invoice price, that is, must account by showing it had sold the goods, is not only a most unnatural construction but is inconsistent with the remainder of the agreement.

Paragraph 8 provides:

> "If for any reason this agreement terminates, all of the merchandise, possession of which is held by the party of the second part" (the Niagara Company) "under this agreement, shall, at the termination, be immediately returned to the possession of the party of the first part" (the Woolen Company.

This eighth clause is inconsistent with the idea that, under Clause V, the Niagara Company was obligated to pay for all merchandise delivered to it and that the transaction was a sale. It clearly shows that the Woolen Company never lost title to the merchandise delivered by it to the Niagara Company, except upon a sale by the Niagara Company to *bona fide* purchasers, in that all merchandise not sold and in the possession of the Niagara Company at the termination of the agreement, must be immediately returned to the Woolen Company. Under this clause of the agreement, the Niagara Company was not compelled to pay over or buy the goods remaining unsold at the termination of the agreement, but it was under an obligation, in accordance with the letter and spirit of the agreement, to return them to the Woolen Company.

Furthermore, it is clear from the modification of the agreement made in November, 1903, that the discounts were computed from the time the Niagara Company sold the merchandise delivered to it by the Woolen Company. Clearly, this is inconsistent

with the idea that, under the agreement, the Niagara Company could at any time be compelled to pay the invoice price of merchandise unsold. This provision of the agreement is meaningless, if the Niagara Company could be compelled to pay for goods delivered to it by the Woolen Company before it had sold them, and before the time began to run within which it could obtain the discount.

If the construction placed upon Clause 5 of the agreement by the learned Trial Judge is correct, then as Clause 1 of the agreement compelled the Niagara Company to accept any goods which the Woolen Company should in its judgment see fit to deliver to it, it would have been possible for the Woolen Company, at any period of the year, to have delivered goods in any amount to the Niagara Company, whether it wanted such goods or not, and then to have demanded that the Niagara Company account to it. Though the Niagara Company had not sold the goods delivered or even had an opportunity to sell the same, under Judge Hough's construction, the Woolen Company could have then demanded that the Niagara Company at once pay the invoice price of such merchandise.

For example, if the appellant's contention is sound, a month after the agreement had been entered into, the Woolen Company could have delivered to the Niagara Company, although the Niagara Company did not request it to do so, a million dollars worth of merchandise. Immediately thereafter it could have called upon the Niagara Company to account and demanded payment of the invoice price of the merchandise so delivered, even though the Niagara Company had not sold or had any opportunity to sell said merchandise. Obviously this is not what the parties intended. No Court would have permitted the Woolen Company to recover under the agreement either from the Niagara Company or the Horowitzes the invoice price of goods so delivered and unsold.

The appellant in his brief seeks to fortify his

argument, as to the manner in which Clause V of the agreement should be construed, by stating that the manner in which the parties transacted their business under the agreement indicates the correctness of his position.

We agree with the appellant that, if a contract is ambiguous, the court in construing it should consider the circumstances attending its execution and the manner in which it is performed by the parties. We respectfully submit, however, that as above shown the agreement is not ambiguous; that it is clear upon its face; that it should be construed as above contended; and that any other construction is forced, strained and unreasonable. We further contend that there is nothing, either in the circumstances attending its execution or in the manner of the performance, which in any way sustains the appellant's position.

Point II of Appellant's Brief Answered.

The appellant, in Point II of his brief, states the grounds upon which he claims that the transaction was one of sale and not a consignment or factorage agreement. He enumerates seven alleged elements of the transaction which he contends support his position.

Before answering these contentions, however, we again call the Court's attention to the fact that the learned Trial Justice, who awarded judgment in the appellant's favor, found that the agreement was honestly lived up to, and based his conclusion that the transaction was a sale rather than a consignment, upon the construction given by him to the agreement, to wit, that the Horowitzes had to take and pay for every yard of goods delivered to the Niagara Company by the Woolen Company. He stated that consignment agreements might take various different forms. The only element in this case, which he considered inconsistent with the con-

signment, was the fact that under his construction of the agreement the Horowitzes, acting through the Niagara Company, were bound to pay for all goods, whether they were sold or not (p. 213).

1. There is nothing in the manner in which the goods, delivered to the Niagara Company, were selected or the prices fixed, to indicate the contract was one of sale and not a consignment agreement.

Under the agreement the Woolen Company, it is true, had the right to ship to the Niagara whatever goods it pleased. There was nothing in the agreement to prevent the Woolen Company, if it so desired, from permitting the Niagara Company from indicating what goods it preferred to have consigned to it. To ship it such goods, and such goods only, was not a departure from the agreement and was not inconsistent with a consignment.

Naturally it was to the advantage of the parties for the Niagara Company to select what goods were to be consigned to it. It was to the advantage of the Woolen Company, because Philip Horowitz was in a better position to judge what goods were saleable. The Woolen Company only desired to ship such goods to the Niagara Company as it was likely to sell. It did not wish its goods left around unsold. It was to the advantage of the Niagara Company, as the factor of the Woolen Company, as the Niagara Company only made a profit when it sold the goods as factor. Under the agreement, its compensation for selling such goods was the difference between the price at which it sold the same and the price at which the goods were invoiced. For this reason it was also interested in having the goods invoiced to it at as low a price as possible. There was nothing in the manner of ordering the goods which in any way indicates that the transaction was a sale rather than a consignment.

2. The Woolen Company was obligated to take back unsold goods.

The appellant contends that the Niagara Company could not return any goods which had once been ordered. This, however, is not the case. As above shown, under the agreement, the Niagara Company was only obligated to pay for such goods as it sold. The eighth clause of the agreement specifically provided that, upon the termination of the agreement, the Woolen Company should take back all unsold goods.

The agreement was for one year Therefore, at the end of the year, the factor could return whatever goods were unsold. It was immaterial whether or not he could return them before this time. There is nothing in the contract to indicate to the contrary. Appellant, however, refers to a letter written by Clifford Woodhull, an agent of the Woolen Company, in December, 1903, in which he stated: "We cannot at this late date consent to have thrown back in our stock fall goods which were made expressly for you and delivered in accordance with the terms of the agreement." This letter was written, in reference to a request to take back goods prior to the termination of the contract. It was at the most an attempt on the part of an agent of the Woolen Company to force the Niagara Company to keep and endeavor to sell the goods in question. It cannot outweigh the positive intention of the parties as expressed in their written agreement and by their course of conduct, which was in accordance with the terms of the contract. It was but a single instance extending over a long period of time, and there is no proof in the record as to what, if anything, happened as a result of this letter. For aught that appears, the goods were taken back. If they were unsold at the end of the year, clearly under the contract the Woolen Company had to take them back. Mr. Woodhull's opinions on the subject could not alter the written contract. Nor

was it inconsistent for the Woolen Company to endeavor to make its agent keep the goods it had selected to sell as consignee and make further efforts to dispose of them. As to inconsistent letters written after the making of an agreement see *Smith* vs. *Nixon Co.*, 149 Fed., 111.

3. There is no merit to the appellant's third contention.

Certain goods were apparently held in storage by the Woolen Company for the benefit of the Niagara Company, so that it could have them delivered to it to sell under the consignment agreement when it so desired. In other words, instead of shipping to the place of business of the Niagara Company a lot of goods which the Niagara Company did not have room for and was not ready to sell, the Woolen Company held these goods in storage. They were charged on the books of the Niagara Company. Apparently, all this meant was, that they were subject to the call of the Niagara Company. The fact that they were charged did not mean that the Niagara Company was obliged to pay the Woolen Company therefor. Its only obligation was, when it received the goods from storage and sold them, to pay over to the Woolen Company the proceeds of such sale. There is nothing in this inconsistent with such consignment.

The cases cited by the appellant to sustain his contention do not apply.

A reading of *Ommen* v. *Talcott* (188 Fed., 401), rather sustains the appellees' position. In that case the bankrupt was the owner of the goods and the defendant Talcott claimed a claim as factor upon the goods, although they remained in the bankrupt's possession. The Court said that, as there was no delivery of the goods to the factor, the factor did not have a lien. The goods remained the property of the bankrupt.

To apply that case to the warehouse goods in the

case at bar: the goods in the warehouse remained the property of the Woolen Company.

It does not follow from this that the goods that were delivered in accordance with the agreement did not remain the property of the Woolen Company.

4. There is no duty upon a factor to keep the goods of his principal in a separate part of his store from that where he keeps his other goods.

The only duty upon a factor is that he should keep a separate account of his transactions for the account of his principal, and know when he delivers goods, whether the transaction is for his own account or for his principal's account and whether the goods are his own goods or his principal's goods.

Here of course the only goods handled by the Niagara Company were the goods on consignment from the Woolen Company. Disregarding the Niagara Company and considering the transaction as being with the Horowitzes, it is clear that a separate account was kept of the Woolen Company's goods, separate books were kept for the Niagara Company, and all the Woolen Company's goods were billed in their name and the proceeds put in a separate account.

5. The fifth contention of the appellant is answered by the contract itself.

The fourth paragraph of the agreement provided that the Niagara Company "agreed to collect for and on behalf of the party of the first part" (the Woolen Company) "all bills and accounts for merchandise so sold, and to immediately pay over to the party of the first part any amount collected as aforesaid immediately upon its collection, minus, however, the difference between the price at which the said merchandise so collected had been invoiced to the party of the second part and the price at

which said merchandise has been sold by the party of the second part" (the Niagara Company).

This part of the agreement, as found by the learned Judge, was lived up to until the Horowitzes began to steal checks without the knowledge of the Woolen Company.

The fact that the Niagara Company had to pay for goods, the proceeds of which it did not account for, does not change the transaction, but was merely a statement of what the law would require.

6. The other business methods of the parties were not inconsistent with the consignment.

The appellant seeks to draw comfort from the fact that in 1901 and long prior to the organization of the Niagara Company and the entry into the contract in question with it, Philip Horowitz & Son bought merchandise outright from the American Woolen Company, and cites *In re Wells*, 140 Fed., 752. That case is not in point, as in that case the Court merely held that the fact that the bankrupt had formerly purchased goods outright was an element to be taken into consideration in judgment of the new arrangement, which was clearly not a consignment arrangement. The decision was by the District Court for the District of Pennsylvania.

The case at bar is entirely different, in that, at the time the arrangement was entered into with the Niagara Company, the bankrupts were not buying goods outright from the Woolen Company, but were receiving goods under a consignment arrangement. When the witness Horowitz testified that Mr. Murphy said the business of the Niagara Company was to be done in the same way, he referred to the old consignment arrangement.

The Trial Judge seems to recognize (pp. 24 and 25) that the 1901 agreement was a consignment agreement, and the majority of the Circuit Court of Appeals held that the arrangement was valid.

Furthermore, in the case of *Matter of Flanders*,

134 Fed., 560, which was decided by the Circuit Court of Appeals for the Seventh Circuit, Judge Jenkins, writing the opinion of said Court, at page 562, said:

> "The fact that Flanders for some years prior to this consignment had purchased goods of the bailee does not avail to prove such contention" (The contension being that the transaction was a sale and not a consignment.)

The fact that subsequently the words "sales" and "salesmen" appeared on the various documents does not change the transaction. Business men are careless in the use of term.

The case *In re Smith & Nixon Piano Co.*, 149 Fed., 141, is in point. In this case the transaction was held to be a consignment or bailment, and that title remained in the consignor, although invoices had been sent which stated the goods were sold to the consignee and although other letters passed between the parties which might be construed to indicate the transaction was a sale. The attention of the Court is particularly called to the language used by the Circuit Court of Appeals, at page 112, in which the test is made whether there was any obligation on the part of the bankrupt to pay for the goods and whether if he had been sued it would not have been a complete defense to show he was not to pay for the goods until he sold them. The Court says, at the foot of page 111:

> "We started with title in the piano company and unless an intention that it passed it to another can be discovered, it remains where it was with all appurtenant rights."
>
> See also *Dores* v. *The Bank*, 91 U. S., 618, at p. 630.

In the case at bar, however, although the regular printed notices of the Woolen Company were used, which were drawn for the purposes of sale, the Woolen Company was careful to have written upon

each invoice: "These goods are delivered on consignment by the Woolen Company and accepted by the Niagara Company upon the express condition that title thereto shall remain vested in the American Woolen Company until paid for." This statement was inserted to override any other provisions on the invoice which did not apply.

The consignment agreement did not permit the factor to sell for what he pleased. It could not sell for less than the invoice price and it was not required to pay for the goods unless it sold them.

A careful reading of the agreement shows an intention that the Niagara Company could not sell for what it pleased, and in no case was to sell for less than the invoice price. This is evident from the fourth paragraph of the agreement, which provided that it was to pay over the difference between the price at which the merchandise so sold had been invoiced for and the price at which the merchandise was sold by the Niagara Company. It is also apparent from the testimony of Joseph Horowitz, who was most hostile to the Woolen Company. He testified (p. 68): "*I wasn't supposed to sell; I wouldn't sell under cost.*" The fact that he could sell for more than the cost price and keep the difference was not at all inconsistent with the consignment arrangement.

In re Smith & Nixon Piano Co. (*supra*), Circuit Judge Hook, speaking of a sale and a consignment, states (p. 113):

> "The specification of fixed prices is as appropriate to one as to the other. It is not an uncommon feature of contracts of bailment, and it means that the commission of the consignee is such sum as he may obtain for the property above the specified price."
>
> See also *In re Galt*, 120 Fed., 64.

The appellant's contention that the Niagara Company must pay for the goods whether it sold them or not, has already been answered at length.

The Niagara Company only had to account for such goods as it sold, and such goods as it did not sell it could return at the end of the agreement. It was never under any liability to pay for unsold goods which it had on hand.

The appellant's contention that even under the construction placed upon the agreement by the majority of the Circuit Court of Appeals the agreement was one of sale, is without merit. The appellant states that under this construction, if the Niagara Company paid the invoice price, it got title to the goods or to their proceeds, if they had already been sold, and that, therefore, Horowitz had a right to buy the goods absolutely.

Even if Horowitz had the right to buy the goods, we do not think that this would interfere with the agreement being one of consignment. We take issue with the appellant's statement of the transaction. The agreement clearly contemplated that Horowitz should sell the goods and should not buy for himself. The provision as to his paying the invoice price if he did not account for the proceeds and thereupon obtain title to the goods or their proceeds, was practically to guarantee the Woolen Company that if the goods were not accounted for as provided in the agreement the loss should not fall upon the Woolen Company. It does not appear that when the arrangement was entered into with the Niagara Company that it was ever contemplated that the Niagara Company or Horowitz should buy the goods; or that they ever did as a matter of fact buy them.

The cases cited by appellant are not in point. They are so clearly based upon an entirely different state of facts that we shall not distinguish each one.

There is, therefore, no merit to the defense.

POINT II.

Even if the transaction between the Woolen Company and the Niagara Company were not a consignment of the merchandise, nevertheless the Woolen Company retained title to the merchandise until payment was made, and, if the transaction were a sale, it was a conditional sale valid under the laws of the State of New York.

Assuming the learned trial Judge to be correct in his interpretation of Paragraph V of agreement between the Woolen Company and the Niagara Company, the arrangement between the parties was for a conditional sale, the title to the property not to vest in the Niagara Company until the payment of the invoice price. The language of the clause is that, if the Niagara Company does not account for the merchandise delivered under the provisions of the agreement, it will pay to the Woolen Company "the invoice price of said merchandise, *and thereupon title to said merchandise or the proceeds thereof so paid over, shall pass to*" the Niagara Company.

It is perfectly apparent from the written documents offered in evidence and from the testimony of the parties, that the whole purpose and intention of the parties was to keep the title to the merchandise delivered in the Woolen Company. It was not to be divested of title in any way until the merchandise was paid for, except by a legitimate sale made by the Niagara Company, in which case it was to pay over the proceeds to the Woolen Company. If the Trial Judge's conclusion, that the Niagara Company was bound to buy the merchandise, be correct, *then it was only to acquire title, and the*

Woolen Company was only to lose title upon payment of the invoice price. This is clearly a conditional sale, recognized as such by all the authorities in the Courts of the State of New York and not contravened by statute or repugnant to any principle of law.

Empire State Type Founding Co. v. *Hugh J. Grant, Sheriff, &c.*, 114 N. Y., 40.

Adams v. *Roscoe Lumber Co.*, 159 N. Y., 176.

Fennikoh v. *Gunn*, 59 App. Div. (N. Y.), 132.

Dunlap v. *Mercer*, 156 Fed., 545.

Under the statutes of New York State, a contract of conditional sale is valid as against creditors or a trustee in bankruptcy, even though it is not filed. The failure to file only makes a conditional sale void as to subsequent purchasers, pledgees or mortgagees in good faith.

N. Y. Cons. Statutes, Sec. 62 of Personal Property Law.

With reference to this statute and the law in the State of New York, attention is called to the case of *Hewit* v. *Berlin Machine Works*, 194 U. S., 296. In that case, the bankrupt contracted with the Berlin Machine Works for the purchase of certain machines for a certain sum, payment to be made within four months from the date of shipment and title to the property to remain in the Machine Company until fully paid for. The machines were shipped to and received by the bankrupt and put in operation in her planing mill. She signed and delivered to the Machine Company two promissory notes which contained the following clause: "Title and right of possession of the property for which this note is given remains in the Berlin Machine Works until fully paid for." This Court held:

"This sale was a conditional sale and the title did not pass to the vendee because the

> condition was not fulfilled, unless the statutes of New York otherwise provided."

The Court then quoted the New York statute then in force, which provided that such a conditional sale should be void as against subsequent purchasers, pledgees, or mortgagees in good faith, unless the contract was filed.

The contract in the case cited was not filed, but this Court held that the trustee was not a subsequent purchaser, pledgee or mortgagee in good faith, and that omission to file the contract was immaterial.

The present statute, which is Section 62 of the Personal Property Law, is substantially the same as the laws of 1897.

This Court, in said case, quoted with approval from the opinion of the Circuit Court of Appeals in the case of *Re New York Economical Printing Co.*, 49 C. C. A., 133; 110 Fed., 514, as follows:

> "The Bankrupt Act does not vest the trustee with any better right or title to the bankrupt's property than belong to the bankrupt or to his creditors at the time when the trustee's title accrues."

The case of *York Mfg. Co.* v. *Cassell*, 201 U. S., 345, *holds the same doctrine and that the trustee stands simply in the shoes of the bankrupt and takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it and subject to all equities impressed upon it in the hands of the bankrupt.*

In the case cited, certain machinery was sold by the York Manufacturing Company to the bankrupt, and was delivered under a contract containing a stipulation that the title should remain in the York Manufacturing Company until the entire purchase price had been paid. The contract was not filed, as required by the laws of Ohio. The Court held the sale to be a conditional one and that an adjudication in bankruptcy is not equivalent to a judgment or

attachment so as to operate as a lien in favor of the trustee as against the vendor, because of non-compliance with the statute of Ohio, which, if given the construction placed by the highest state court upon a similar provision respecting chattel mortgages, renders the unfiled contract of conditional sale void only as to creditors who have fastened upon the property by some specified lien.

In *Bierce* v. *Hutchings*, 205 U. S., 340, the Court held, that a contract for the sale of certain cars, engines, etc., to remain the property of the seller until the payment of the note given for the purchase price, is no less a conditional sale because possession was to be and was delivered, and it may have contemplated that the rails would be put down upon the roadway assumed to belong to the purchaser, or because the contract required additional security in the form of first mortgage bonds of the purchaser

The appellant apparently admits the propositions, that an unrecorded conditional sale is valid in the State of New York and that title, under a conditional sale, remains in the vendor as against the trustee in bankruptcy. He attacks the transaction herein by attempting to show that the vendee herein was allowed to deal with the merchandise, which was the subject of the sale, in a manner inconsistent with the continued ownership of the vendor.

We do not dispute the general proposition that any conditional sale or chattel mortgage is void as to creditors, if it permits the debtor to sell the goods and use the proceeds for his own benefit. We do not think the appellant correctly interprets the New York decisions upon this subject.

The courts of this State, as above shown, recognize that there is nothing invalid in the separation of ownership of title and possession. They also recognize that it is lawful and valid for the vendor to permit the vendee to sell the property, provided he is not permitted to use up or consume the proceeds, but is obligated to turn them over to the

vendor so that they can be applied in payment of the debt.

Conkling vs. *Shelley*, 28 N. Y., 360.
Brackett vs. *Harvey*, 91 N. Y., 214.

The entire distinction between the cases where the conditional sales and chattel mortgages are held valid and where they are invalid, is based upon this question as to whether the vendee, who sells the goods, can consume the proceeds by using them for his own benefit, or whether he must turn them over to the vendor. In the cases cited by appellant and by the learned Trial Judge, in his opinion, this rule is expressly recognized.

In *Brackett* v. *Harvey*, 91 N. Y., 214, the Court, at page 220, expressly recognizes the principle contended for, and says:

> "If the mortgagor sells and actually pays over the whole proceeds, nobody is harmed, for that has only happened which is the proper and lawful operation of the mortgage. If, on the other hand, such proceeds have not been paid over, the adverse lien is still unharmed, for, as against it, such proceeds are deemed paid over and applied in reduction of the mortgage debt, although between mortgagor and mortgagee the debt remains and is still unpaid." (Referring to a case where the mortgage provides that the proceeds of sales were to be turned over to the mortgagee.)

The New York Court of Appeals, in this case, cites the case of *Robinson* v. *Elliott*, in this Court, 22 Wallace, 524, and says that the effect given to the stipulation under discussion has received the approval of this Court in a case where the whole subject was deemed open.

In the case cited, the mortgage also contained a provision that the mortgagor might sell on credit, taking good business paper, which the mortgagee was to accept and apply on the debt, and the Court held (at p. 222), that, even this provision could not

be said to affect injuriously the rights of other creditors.

Conkling v. *Shelley*, 28 N. Y., 360, held, that a mortgage containing a clause permitting the mortgagor to dispose of the mortgaged property in his discretion and to apply the proceeds to his own benefit, is void. It distinguishes such a provision from one where the mortgagor might sell, not for his own benefit, but for the mortgagee's, accounting to him and applying the proceeds of sales to the satisfaction of the debt, which the mortgage was given to secure, and holds that in such case the mortgagor becomes the agent of the mortgagee and whatever is received in payment for the goods sold is a satisfaction of the mortgage debt *pro tanto*, whether paid or not.

Edgell v. *Hart*, 9 N. Y., 213, simply held that a mortgage which permitted the mortgagor to sell the mortgaged property and receive the proceeds to his own use was void as a matter of law.

In *Russell* v. *Winne*, 37 N. Y., 591, dealing with the question as to whether a mortgage was valid under which the mortgagor was constantly selling portions of the property as his own, for his own benefit, with the knowledge and assent of the mortgagee, and the Court held that it was void as against creditors. It was not necessary to discuss the other well settled question, that if the mortgagor had turned over the proceeds of the sales to the mortgagee, such an arrangement would have been valid, as the question did not arise in the case.

In re Howland, 109 Fed., 869, was a case where merchandise was sold, with the expectation and for the purpose of retailing it over the vendee's counter, and it has been universally held that such a state of facts is inconsistent with the retention of title in the vendor, because the proceeds of sales could not be and were not paid over to him.

In *Matter of Penny & Anderson*, 176 Fed., 141, cited by the learned Trial Judge and by the appellant, the debtors were permitted to sell and dispose

of the goods, which were wines and liquors, in the ordinary course of their business as restaurant keepers, which was in itself inconsistent with the idea of a consignment or the retention of title. The agreement was silent as to the disposition of the proceeds of sale, and as a matter of fact, these proceeds were placed in the business and to the credit of the bankrupts.

This case is like the chattel mortgage cases in which a party undertakes to allow another to use property as if it were his own, thus virtually giving up a lien upon the property, but asserting one when the mortgagor gets into difficulties with his creditors.

As stated in *Robinson* vs. *Elliott*, 22 Wallace, 524, the arrangement in the Penny & Anderson case was one which made it merely a shield to the debtor, and without any force as a security to the holder.

In the Penny & Anderson case the bankrupts were allowed to use the proceeds of sale as their own, and the agreement therein recognized an indebtedness on the part of Penny & Anderson, and there was no agreement that the proceeds of sale were to be kept in a separate fund, and as a matter of fact, they were not so kept. The facts are entirely inconsistent with the continuance of title in the vendor, or with the idea either of consignment or a conditional sale, and thus make the arrangement one tending to hinder, delay or defraud creditors.

In re Garcewich, 115 Fed., 87, was a case where goods were *sold to the bankrupt by the United Shirt & Collar Co., upon credit*, on the understanding that the title to such of them as should not be sold to the bankrupt should remain in the vendor until payment of the purchase price.

While the Court held that it was the settled law of the State that personal property might be sold and delivered under an agreement for the payment of the price at a future day, and the title, by ex-

press agreement, remained in the vendor until payment of the purchase price, it further held that the payment of the purchase price in the case quoted was not made conditional upon the vesting of title, but the goods were actually sold to the bankrupt, and a secret agreement was made by which the title to such of them as were not sold by the bankrupt was to remain in the vendor.

The facts, in the case last cited, clearly show legal fraud, because the title to the property was vested in the bankrupts, but in case they should not sell any, then the title to the goods unsold was to remain in the vendor, which meant that it was practically to revert to or revest in the vendor. Having the title to the goods, the bankrupts had the right to use the proceeds of sale. This was another of that class of cases in which it is held to be a legal or constructive fraud to have some secret arrangement by which title shall be passed from the vendor to the vendee, thus giving to and clothing the vendee with the absolute right to dispose of the goods *and keep the proceeds*, and then in case creditors shall assert their claims to the goods in question, to have a secret agreement with the vendor, by which the title is to revert or pass to him.

In re Wells, 140 Fed Rep., 752, the facts were also entirely different from those in the case at Bar. The bankrupt had handled silk threads of the claimant for a number of years. In September, 1904, however, having fallen behind in her payments and becoming considerably indebted to them, it was arranged *that thereafter the goods should be consigned to her*, instead of being sold to her in the regular way. It was further provided that she should take an inventory of those which she had on hand, which were to be thereupon credited on her general indebtedness and charged to her on her consigned account, and thereafter be held in that way. With respect to these and those which were subsequently received,

she was to report monthly the amount she had on hand and the sales which she had made, paying for the latter the regular wholesale price at which the goods were billed to her.

It was urged by the Silk Company that this money received from sales should be kept separate, but this Mrs. Wells declined to accede to, as being impracticable.

The question in the case was: whether Mrs. Wells was merely acting as the factor or agent of the Silk Company in disposing of the goods, or whether in making sales she acted for and on her own account, realizing what she could, and being answerable to them only for the wholesale price.

The Court properly held that as to the goods which she had on hand September 8, 1904, at the time of the supposed change in her relation to the Silk Company, there could be no such shifting over from one account to the other, as was attempted. And the Court properly said (p. 754):

> "She had numerous creditors, whose debts are still unpaid, and the title to the property which she had could not be made a mere matter of bookkeeping in this way."

The Court laid stress upon the fact that the goods were sold by her on her own account, at such figures, and to such parties as she saw fit, but were charged to her by the Silk Company at definite prices. That the money was not to be kept separate, and that the only purpose of the provision that she should make monthly reports was apparently in order to keep track of her sales.

In this case (as in the others above quoted under this point), the bankrupt had the right to use the moneys received from sales. She expressly declined to keep the sales receipts separate from her other moneys.

The learned trial Judge also cites the case of *Skilton* v. *Codington*, 185 N. Y., 80, as an authority in favor of his decision, that while the intention of the parties was to retain title in the American

Woolen Company, yet the transaction was fraudulent as a matter of law. The appellant places much reliance on this case. The question therein was whether the chattel mortgage which gave permission to the mortgagor to sell mortgaged chattels and apply the proceeds to the payment of the debt, *excepting such portion thereof as is necessary for the expenses of the business, or as he may need to replenish or increase the stock of goods*, was fraudulent as a matter of law against creditors.

The Court held the mortgage void, but also expressly held that permission given the mortgagor to sell the mortgaged chattels, the proceeds thereof to be applied in payment of the mortgage, did not render the mortgage void (p. 90).

The reason of this decision is given in the opinion, and is contained on the last page at the close of the opinion, page 92:

> "The purpose and intent of the agreement between the parties is plain on its face. The mortgagor was to conduct the business for the term of five years in the same manner as if he was the absolute owner of the stock in trade, selling and buying stock at his pleasure and discretion and paying the expenses of the business out of the sales, while if at any time he should be unsuccessful and be pressed by his creditors, the whole stock was to be subject to the lien of the mortgage as against the creditors from whom the very goods might have been purchased."

The mortgagee, therefore, practically had no lien upon the property, *because he allowed the mortgagor to sell it and use the proceeds as his own*, but in case creditors asserted any claims against the mortgagor, then he was to assert his title under the mortgage to the property remaining. This was certainly a legal fraud upon the creditors.

In the case of *Pontiac Buggy Co.* v. *Skinner*, 158 Fed., 858, the Court, at page 862, recognizes the distinction between the cases cited and the case at

bar and cites a number of cases, including the Garcewich case and the Carpenter case, 125 Fed., 831. In referring to the latter cases it says (p. 862):

> "*In re Carpenter*, 125 Fed. Rep., 831, 833, this Court followed *In re Garcewich, supra*, in a case where the order for goods was quite similar to the one under consideration here, and pointed out the distinction sharply drawn between that line of cases where the title of property sold is to pass when paid for only, and in the meantime the property is to be retained and used by the vendee, or, if sold, the proceeds are to take or stand in its place and be passed over to the vendor in payment or as his own, and that other line of cases where the sale is in terms conditional—that is, it is provided that the title shall remain in the vendor until the property is paid for, *but, still, the vendee is given full power to use up, consume, or sell and give good title and take or hold the proceeds as his own.*" (Citing a number of cases.) (Italics ours.)

Further on in the opinion, at page 867, the Court says that

> "if the agreement be that the vendee may sell, and that if he does he shall pay over the proceeds to the vendor to apply on the debt, then there is no fraud, and the vendee has no title."

In *Re Marine Construction and Dry Dock Co.*, 144 Fed., 649, Judge Lacombe, writing the opinion for the Circuit Court of Appeals for the Second Circuit, clearly states the law of New York State, at page 651:

> "It is abundantly settled by authority, as petitioner contends, that (all requirements as to filing, recording, etc., being complied with) a mortgagee of materials may agree with the mortgagor that the latter may remain in possession of the goods and may sell them, from time to time, provided that the proceeds of all thus sold are applied either to payment on the mortgage, or to reducing some prior lien,

or to the purchase of additional property, of not inferior value, to take the place of what is sold."

See, also:

Smith vs. *Williams*, 90 App. Div. (N. Y.), 507.
Dunlap vs. *Mercer*, 156 Fed., 545.
In re Hartman, 185 Fed., 196.
In re Perlhefter, 177 Fed., 299.

Applying the rules laid down by the foregoing decisions to the facts in the case at bar, we respectfully submit that the Woolen Company had a perfect right to take back the goods in question, inasmuch as the title thereto was in it.

The written agreement between the parties, if it established anything, established the fact that it was the intention of the parties that the title to the merchandise, or the proceeds thereof, should never pass out of the Woolen Company until payment had been made therefor, unless the goods were sold by the Niagara Woolen Company to *bona fide* purchasers, in which case the Niagara Company was the agent of the Woolen Company, to collect for it and pay the proceeds over.

There is absolutely nothing in the agreement, which would indicate for a moment, that the Niagara Company or the Horowitzes were ever to be entitled to deal with the goods as their own, or to exercise any acts of ownership until they had paid for the goods. In fact, the entire arrangement, as shown by the organization of the Niagara Company, was to prevent the Horowitzes from ever getting title to the merchandise in question, unless it was paid for, and to assure the Woolen Company that it would either have the title to the merchandise or receive the proceeds upon its sale. Every precaution was taken to prevent the bankrupts from using the proceeds of sales in their business.

The intention of the parties could not be more clearly expressed than in the case at bar, and the

court is now asked to disregard that intention, and hold that the parties did not intend nor did their acts and writings declare this to be so. This the court will not do, unless it finds that the whole arrangement was not *bona fide*, and was a cover for some fraudulent scheme entered into between the parties. The finding of the learned trial Judge negatives any such idea, and on the contrary, establishes the fact that the arrangements entered into between the parties were *bona fide*, and that they were carried out according to the letter and spirit of the agreement until May, 1904, when Philip Horowitz, the President of the Company, began to steal the proceeds of sale (p. 211).

The appellant's argument is an attempt to overcome the force of the decisions hereinbefore cited, by an endeavor to find something in the acts of the parties, which would not only show that the agreement entered into between them was not the real agreement, but which would be in direct opposition to the finding of fact of the learned trial Judge. He alludes to the fact, that, when the goods were sold, the proceeds were not paid over directly to the Woolen Company, but instead they went temporarily into the Niagara bank account.

If we treat the Niagara Company as the Judge did, as being virtually the American Woolen Company (p. 214), then the proceeds went, where they were intended to go under the agreement. If, as appellant seeks to argue, the Niagara Company represented the Horwoitzes, then the proceeds of sale, being paid to the Niagara Company, were no longer subject to the disposition of the Horowitzes, because they could not be withdrawn from the Niagara Company without the concurrent assent and signature of the Treasurer of the Niagara Company, who was in the employ and under the control of the Woolen Company (pp. 41, 157).

The arrangement, whatever it was, absolutely secured the one important thing for the protection of the Woolen Company—that the proceeds of sale

could not be used by the Horowitzes, or the Niagara Company, as their own, without either or both of them committing a crime. All the proceeds of merchandise, title to which vested in the Woolen Company, were paid over, as received, to the Niagara Company, and inasmuch as this company had no dealings with any other person or corporation except the Woolen Company, all the moneys in its bank account were held by it for the Woolen Company. The fact that these moneys were not paid over by the Niagara Company to the Woolen Company instantly as and when received, but were paid over from time to time, makes no difference, because eventually they were all paid over to the Woolen Company, as agreed.

Attention is called, in this connection, to the testimony of Joseph Horowitz, on pages 76 and 77 of the record, the substance of which is as follows: Sooner or later all the money that was realized by the sale of goods that came from the Woolen Company went into the bank account of the Niagara Company. It all went to the Woolen Company, with the exception of a balance of about $1,200, which represented the profits, and which was retained in the Bank by the Niagara Company to pay expenses, when there was a profit.

See also testimony of Joseph Horowitz, page 78, where he states that the reason he did not keep on drawing the $1,200, was that Mr. Dawber, the treasurer, said that the sales did not warrant it.

Horowitz further states (p. 77) that Mr. Dawber (the treasurer) came in every day, and whatever money came in that day the deposit was made and Mr. Dawber and he signed checks, and they made out a check and it went to Boston, and Mr. Dawber took it over. (The American Woolen Company's financial office was in Boston.)

That this $1,200 a month was paid out of profits, so long as it was paid, is found by the learned Trial Justice in his opinion at page 209, where he says: "No dividends were paid on the Niagara Company

stock, nor are any earnings of that Company shown in excess of $1,200., while in the early summer of 1904 these payments were stopped because in the opinion of the Secretary and Treasurer the 'earnings did not warrant' them."

That the Woolen Company could keep track easily of the earnings of the Niagara Company is evident from the fact that the earnings were the difference between the price at which the goods were invoiced and the price at which they were sold, and the books were in charge of the Woolen Company's bookkeeper, who, of course, knew and recorded the invoices and sales prices, and received the proceeds of sale, entering them upon his books (pp. 117-122)

In addition to this, the Niagara Company rendered to the Woolen Company monthly reports of the sales, and Mr. Dawber, the treasurer of the Niagara Company, called daily and kept track of all receipts (pp. 120, 101).

If, as the appellant contends, there was nothing to prevent the Horowitzes from selling, and not reporting the sales, that would not alter the rights of the parties under the agreement.

Conkling vs. *Shelley*, 28 N. Y., 360, 364.

The criticism of appellant's counsel of the majority opinion of the Circuit Court of Appeals, wherein it was stated that the agreements in question were contracts containing elaborate provisions to prevent the consignee from procuring the goods and selling them and applying the proceeds to their own use, is not justified, and we accept the challenge of appellant's counsel, on page 75 of his brief, to show these elaborate provisions.

Briefly stated, and as heretofore argued, the agreement in question contained a provision that the title to the goods in question should remain at all times in the Woolen Company, and should pass directly from it to the persons to whom they were sold by the Niagara Company, and that the proceeds of sale

should be collected by the Niagara Company as the agent of the Woolen Company, and immediately paid over to it.

It further contained a provision that all goods remaining unsold at the expiration of the contract, and remaining in the possession of the Niagara Company, should at such termination be immediately returned to the possession of the Woolen Company, and although the agreement contemplated a case in which the Niagara Company might fail to account, as its agent, as provided in paragraph 4 of the agreement, it further expressly provided that title to the merchandise should only pass to the Niagara Company upon payment of the invoice price. The formation of the Niagara Company itself, and the whole plan devised for the protection of the Woolen Company, is strong evidence of an intention and purpose on the part of the Woolen Company, acquiesced in by the Niagara Company and the Horowitzes, to retain the title to the merchandise and to the proceeds thereof, and to prevent the dissipation of the goods or their proceeds.

In addition to these provisions contained in the agreement, which we think are elaborate enough to answer the criticism and challenge of appellant's counsel, the Woolen Company further undertook to secure the performance of these conditions by compelling Horowitz to pledge to it, as security for the performance of the contract, all the stock held by him in the Niagara Company.

After the Woolen Company had thus, by a written agreement, which is found by the learned Trial Justice to have been made in good faith, undertaken to secure to itself the title to the merchandise and its proceeds, and to constitute the Niagara Company and its officers its agents for the purpose of collecting the proceeds of sale and turning same over to the Woolen Company, the validity of this arrangement cannot be affected by the fact that Philip Horowitz, the president of the Niagara Com-

parties was a valid one. He apparently misunderstood the force of said decisions. Legal fraud only exists, under these cases, where the party is permitted to use the proceeds of sale as his own, which the Judge found was not done in this case.

The arrangement was not fraudulent in law, in that the Niagara Company had a right to sell the goods, because under the arrangement the proceeds of such sale were to become the property of the Woolen Company.

It was not fraudulent in law, because the Niagara Company was under no obligation to and did not keep the goods separated from the goods belonging to Philip Horowitz. The law does not impose any such duty upon the part of any consignee or vendee upon a conditional sale, and there is no contention in the case at bar that any creditor was misled by any mingling of goods. The allegations of the bill of complaint to this effect were abandoned on the trial. The goods were held by the Niagara Woolen Company as the property of the Woolen Company, and the proceeds of sale turned over to the Woolen Company.

There was nothing fraudulent in the creation of the Niagara Company, whether that company be considered a mere dummy or as an actual entity. Its existence was in no way concealed or secret. Even if it were merely a dummy, the transactions must be tested as if had directly between the Woolen Company and the Horowitzes, and, judged by this test, the transactions would be valid and the title to the goods in question would remain in the Woolen Company.

Whatever name, therefore, be given to the transaction, the intention of the parties was that the title should remain in the Woolen Company, and it must be judged by such intention, unless it be, as above illustrated, either legally or constructively fraudulent, and there is no fact in this case which would warrant the conclusion that the transaction was in any way fraudulent in law. It is difficult

to see how these transactions could possibly have hindered, delayed or defrauded creditors. There is no way that they could be misled. For a year prior the Horowitzes had been known and recognized as the consignees of the Woolen Company. The creation of the Niagara Company was a step further still from giving the Horowitzes even the appearance of ownership. How could any merchant possibly have been misled?

POINT III.

There being no actual fraud, the Court had no right to disregard the legal entity of the Niagara Company and hold that the merchandise in question belonged to Horowitz, and could therefore be recovered by his trustee in bankruptcy.

The Woolen Company intended to consign goods to the Niagara. The Woolen Company intended it obviously, because it would not trust Horowitz. The whole scheme or plan is concededly to safeguard the Woolen Company from the possible future dishonesty of Horowitz. No secret whatever is made by the parties, nor is any arrangement clandestine in its nature entered into. The parties made this arrangement, which is absolutely valid, as the trial Court finds, between themselves. It makes no difference whether it was a sale or consignment, unless the Court can absolutely disregard the Niagara Company which the Court below did. The Niagara Company, it says, was a mere paper corporation; it had no existence practically. The Court seems to overlook the fact that corporations are frequently and legitimately created for the purpose of affirmatively limiting liability. It is an

pany, succeeded in misappropriating some of the proceeds of the sales.

Conkling vs. *Shelley*, 28 N. Y., 360.

The learned Trial Justice, who found in favor of the appellant, placed his opinion upon a different ground. As already pointed out, he construed the agreement to mean that the Horowitzes were bound to pay the invoice price for all merchandise delivered to the Niagara Company under the agreement.

Even assuming this construction to be correct, despite our argument herein heretofore made to the contrary, this Court cannot ignore the express provision in the agreement that the only way in which an absolute sale of the goods could be made and the title pass out of the American Woolen Company was upon payment of the invoice price. See agreement, page 14, which provides that if the Niagara Company does not account to the Woolen Company, as provided in clause 4, that it must pay "the invoice price of said merchandise to the Woolen Company, *and thereupon* title to said merchandise, or the proceeds thereof, so paid for, shall pass to the party of the second part" (the Niagara Company).

The learned Judge in his decision also found, however, that while there was no fraudulent intent and no fraud in fact in the case at bar, the transaction was constructively fraudulent. He does not state, however, just what fact or facts there are in this case to justify this finding that the transaction was fraudulent in law. In fact, it is difficult to tell from his opinion whether or not his conclusion, that title pass out of the Woolen Company to the Horowitzes, is based upon the finding that the transaction was a sale *per se*, rather than upon legal fraud. In parts of his opinion he speaks of legal fraud and cites certain cases thereon. These cases cited by the learned Court have been already referred to in this brief, and we do not think they justify his conclusion, because under said cases the arrangement between the

every day occurrence for men, who wish to limit their personal liability, to convert themselves into a corporation, of which they are the only spirits and the only active factors, and carry on business through the corporation as a mere vehicle, and thus avoid liability for anything more than the capital stock of the company, yet this has never been criticized or condemned, and the very purpose of the law creating corporations was to create just such fictitious entities. And just as the same can be affirmatively done for the purpose of limiting liability, just so it can be negatively done in order to escape needless risk, and to safeguard one's interest. Was it not perfectly legitimate for the Woolen Company to say to Horowitz, "You wish to continue to do business with us; we recognize your ability as a salesman; we are willing to utilize that ability, but we will not trust you; we do not consider you trustworthy; the only way in which we will do business with you is: we will form a corporation; we will trust our goods to that corporation; we will arrange as between you and that corporation that you shall have full selling facilities, and that you shall receive just as much compensation by your activities as you would have received if you were our direct agent."

This is exactly what was done. This is exactly what the trial Court says was perfectly valid between the parties. And yet, forsooth, in so doing, without any proof that anybody has been affected by it, prejudiced by it, or damnified by it, the creditors of Horowitz & Son, because their goods were sometimes mingled by Horowitz with his own, which is a permissible and inevitable feature of every consignment or conditional sale, especially as in the case at bar where the identity was never destroyed, are permitted to claim that this arrangement was fraudulent as to every one of them, and that, as to them and each and every one of them, no matter when, how, or where their debts were contracted, that these goods belonged to Horowitz & Son, and

that the Woolen Company had no right to take or receive them back.

The complainant in this case in framing his bill of complaint asserted *actual fraud*, and also based his right to relief upon an estoppel, claiming that by the mingling of the goods of Horowitz and the Woolen Company's creditors were induced to give credit, and were thereby defrauded.

The trial Judge has found that there was no actual fraud, and that everything that was done was done in good faith. If that be so, then upon what theory can the corporation be set aside? The contract was made with it, the goods were shipped to it, and the fact that the President of the Company, Philip Horowitz, who was to gain by sharing in the dividends on his stock, guaranteed the performance of the agreement by the Niagara Company, is not such a circumstance as would enable the Court to hold that the scheme devised was legally void as against creditors.

The trial Justice says (p. 215): "It results, therefore, that in my opinion the legal effect of the transactions shown in evidence is that at the time defendants removed the goods which are the subject of this suit, such goods had been delivered to Horowitz & Son and were in their possession in pursuance of the contracts of November 25th, 1902, whereof the legal result was to render the persons to whom the goods were delivered and intended to be delivered (*i. e.*, Horowitz & Son) the vendees of the same."

How can it be said, upon the evidence in this case, that these goods were delivered, and intended to be delivered to Horowitz & Son? Every safeguard was taken by the Woolen Company to prevent that very thing. Not only were the goods in fact delivered to the Niagara Company, but under the contracts between the Woolen Company and the Niagara Company, deliveries under sales were to be made direct to the purchasers, and the Niagara Company was to collect the accounts on behalf of

the Woolen Company and pay them over to the Woolen Company. All of this was made for the very purpose of avoiding the giving of possession to Horowitz & Son, and even to prevent the Niagara Company from handling any more goods than was necessary.

There was no actual fraud intended by the parties to the transaction, as the learned Justice found, and if that be so, and if the Woolen Company, which had been consigning goods to Philip Horowitz & Son, prior to the incorporation of the Niagara Woolen Company, desired to protect itself against their subsequent dishonesty, and assure itself that it would always retain title to the goods, thus determined to form this corporation, with Philip Horowitz and Joseph Horowitz, or both of them, as members thereof, why did it not have a perfect right to do so, and consign its goods to the corporation thus formed?

It is true, Philip Horowitz was the largest stockholder in the Company, but his stock was immediately pledged to the Woolen Company as security for the faithful performance of the agreement by the Niagara Company, and all he did was to guarantee the performance of that agreement.

It is true that the Niagara Company was formed for the purpose of dealing with the Woolen Company, but it is evident, from the undisputed facts and agreements, that the Woolen Company wanted to protect its title to the goods which it delivered to the Niagara Company, and one of the Horowitzes was made the president, because he had the means and facilities for selling the goods.

It is not an unusual thing for a factor such as the Niagara Company was, to guarantee sales, nor was it at all strange that the Horowitzes, who owned the greater part of the capital stock of the Niagara Company, and who were to receive therefor the greater part of the profits in the shape of dividends made by the Niagara Company through the sale of its goods, should have

been interested sufficiently to have guaranteed the performance of the contract between the Niagara Woolen Company and the American Woolen Company.

The situation was this: The Niagara Company was formed for the purpose of dealing with the Woolen Company, in order to protect the latter company. The Woolen Company was willing to trust goods to the Niagara Company in such a way as not to be divested of its title. To secure itself still further, it required Philip Horowitz to assign to it all the stock which he had in the Niagara Company, and which was secured by a mortgage given by him to the Niagara Company. This was all honestly done, as the Trial Judge found.

On what theory, then, does the Trial Court brush aside the Niagara Company, which was created for the purpose of dealing with the American Woolen Company, and for its protection, and substitute Horowitz & Son in its place, thus putting them back in the position they were before the Niagara Company was formed.

Unless the complainant in this action had proved the facts alleged in his bill of complaint, that the whole scheme was one entered into between the parties, for the purpose of defrauding creditors, which was not shown on the trial and not found by the learned Trial Judge, then the legal entity of the corporation must be recognized and observed.

It may well be that, if the Woolen Company entered into a scheme with Philip Horowitz to defraud his creditors, and formed the Niagara Company as an intermediary between it and Horowitz, and undertook to deliver goods to it, but really to Philip Horowitz, allowing Philip Horowitz to sell them and pocket the proceeds, and if the creditors of Horowitz & Son sold goods to Philip Horowitz & Son on the faith of his possession of the merchandise so delivered by the Woolen Company, that it would be a fraud upon creditors, and the Woolen Company would be

estopped from claiming its goods as against any person who was thus misled and gave credit to Philip Horowitz & Son.

There is not only no such evidence in the case, but the learned Trial Judge deliberately holds the contrary. In view of all the facts developed at the trial such a charge against the Woolen Company is absurd.

It is important to observe at this point that the bill of complant was not framed upon the theory of an unlawful preference under the Bankrupt Act, but upon a fraudulent scheme entered into to hinder, delay and defraud creditors.

The Trial Judge finds that the delivery of the goods under the agreements and circumstances appearing in the evidence was a sale to Horowitz, because the Niagara Company was only a dummy corporation.

The conclusion of the learned Trial Judge is not justified by the facts appearing in the record. He says (p. 214):

> "There was no real person for the Woolen Company to contract with except the bankrupts, and the whole and avowed meaning and intent of the arrangement was not to consign goods to the Niagara Company, but to enable Horowitz & Son to sell goods at their own prices without owning them. If the Woolen Company could not have dealt with an independent Niagara Company in the manner it did without having its dealings result in a sale, then that situation is not bettered by the intervention between the Woolen Company and Horowitz of a paper corporation which was merely another name for the Woolen Company itself."

The Niagara Company was a real "person," with whom the Woolen Company had a perfect right to contract. Philip Horowitz held all the stock of this Company, with the exception of two shares, which were held by the clerks of the Woolen Company.

The fact that Jeremiah P. Murphy, the manager

of the Woolen Company, as Trustee, had the right to vote upon the stock as the Woolen Company of New York should direct, except that as long as the conditions of the contract were kept and preserved by the Horowitzes and the Niagara Company, he was to vote for such person as president of the Niagara Company as the Horowitzes might designate, did not make it any the less a real corporation.

Horowitz had a large interest in this corporation, upon which he hoped to realize dividends in the way of profits by the sale of the goods by him through his efforts as president of the Niagara Company. This was perfectly proper, and did not tend to destroy the identity of the corporation. It surely cannot be said that it was another name for the Woolen Company itself, because the principal stockholder was Horowitz, and the Woolen Company only held two shares of the stock.

It is true that Horowitz' stock was pledged to the Woolen Company as collateral security for the performance of the agreement between it and the Niagara, but this again was proper, because the Woolen Company was anxious to have some security for the guaranty which the Horowitzes had given, that the contract between the Niagara Company and the Woolen Company would be observed.

The Niagara Company did carry on its own real and independent business, using the president's (Philip Horowitz) services in selling the goods. It did no other business but selling the goods which were consigned to it by the Woolen Company. The fact that the president of the corporation agreed to pay the expenses of running the Niagara Company does not affect the situation, because in the selection of any factor by the Woolen Company, or the consignment of goods by it to another corporation, it had a right to make arrangements upon such terms as would be most beneficial to it. If a factor, as part of a contract, had agreed with the consignor to pay all the expenses of doing the business, relying on the fact that he

would make enough profit over the amount at which the goods were consigned to him, it certainly could not be held to be illegal or fraudulent, and so it follows that if a corporation became the factor of any principal, it would not be improper or illegal for the principal stockholder in the corporation to agree to pay all the expenses of conducting the business of the corporation.

Two answers can therefore be given to the Trial Judge's conclusion: First, that the Niagara Company was neither a dummy corporation, nor another name for the Woolen Company itself, but was an actual corporation, formed for the very purpose, as has been before set forth, of dealing with and protecting itself against the possible dishonesty of Philip Horowitz. And, secondly, even if it was a dummy corporation, that the Woolen Company had the right to form a corporation which should be a separate entity from Horowitz, and over which it could exercise control, for the purpose of protecting itself, and delivering goods only to that corporation.

The cases which are cited by the appellant on the question of when the entity of corporations will be disregarded, all present a different state of facts and involve an entirely different question.

Holbrook, Cabot & Rollins Corp. vs. *Perkins*, 147 Fed., 166, was a case where a corporation, in order to avoid liability, formed a new corporation, which, one of the officers admitted, was organized for the sole purpose of avoiding attachments, and that it was without capital (see p. 168). To this new corporation the principal corporation sublet a contract which it had for the construction of a dam. The action in question was brought against the principal corporation to recover damages for negligence, and the Court held that individuals were not permitted to form corporations for the sole purpose of avoiding ordinary legal liability (p. 169).

In this case, the ruling of the Circuit Court of Appeals in the case of *United States* vs. *Milwaukee*

Refrigerator Transit Co., 142 Fed., 247, was quoted with approval as follows:

> "If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."

Applying that rule to the Holbrook case, the Court was bound to hold that the sub-corporation was formed merely for the purpose of justifying wrong and protecting fraud.

In the case at Bar, however, the Niagara Company was not formed either to defeat public convenience, justify wrong, protect fraud, or defend crime, but to protect the Woolen Company in the delivery of its goods. It was not seeking to avoid any liability to creditors, and the finding of the Judge below, that there was no actual fraud on the part of any one, in the sense either of suppression of truth or suggestion of falsehood practised on creditors, shows that it was not formed for the purpose of committing any fraud, or enabling any one else to commit it.

In the *Matter of Muncie Pulp Co.*, 139 Fed., 547, the Court merely held that it had jurisdiction to order property of the bankrupt in the possession of a bailee or agent to be delivered to the receiver, pending the appointment of a trustee.

In that case, the receiver or agent was another corporation.

If the Woolen Company had become bankrupt, this case might apply, to the effect that whatever interest it had in the Niagara Company could be turned over to its receiver.

In re Rieger, Kapner & Altmark, 157 Fed., 609, is a similar case to the *Matter of Muncie Pulp Co.* (*supra*), and is distinguishable on the same grounds.

In the case of *United States* v. *Milwaukee Refrigerator Transit Co.*, 142 Fed., 247, the bill showed the creation, by the controlling interests of the brewing companies, of a dummy corporation, with dummy directors, and scienter of its character by the carriers, with intend to evade the law

It was in this case that the Court laid down the general rule which has been cited above and which was approved in the case of *Holbrook* v. *Perkins* (147 Fed , 166).

The case of *Booth* v. *Bunce et al.*, 33 N. Y., 139, cited by counsel for the appellee in the court below, involved the same questions discussed in the foregoing cases under this point, where a corporation was fraudulently created for the purpose of avoiding liability under the law.

In the case of *Werner* v. *Hearst*, 177 N. Y., at page 67, the Court would not allow an inquiry into the corporate entity, where it was shown that the defendant was not the owner of the wagon which caused the accident, but that it was owned by a corporation.

In re Watertown Paper Co., 169 Fed., 252, recognizes that the separate entity of a corporation is not to be disregarded except to circumvent actual fraud.

If no fraud was actually intended by the parties in the formation of the Niagara Company in what respect can the arrangement be said to constitute a legal fraud in the sense that it operated as a fraud upon creditors and the parties must have intended the consequences of their acts?

It cannot be denied that the Woolen Company had the right to form the Niagara—What was its purpose in so doing?—not to hinder, delay or defraud the creditors of Horowitz—but because it did not have faith in Horowitz and wanted to protect itself against him.

If the Woolen Company had without any actual attempt to defraud creditors consigned the goods directly to Horowitz, it would have had the legal right to do so, and even if in law, it had been held that

the effect of the dealing of the parties had been a sale instead of a bailment, no legal fraud could have been inferred.

The most that could have been held would be that the goods belonged to Horowitz, and the only remedy of the Justice would have been an action to recover them back upon the ground that an unlawful foreclosure was made. No such point is involved in the case at bar.

POINT IV.

Even if it be held that the transaction in question was a sale of the merchandise to Philip Horowitz & Son, the bankrupts, the complainant is not entitled to recover, because the bankrupts returned the property to the Woolen Company, the seller, thus paying a lawful debt.

This action is brought to recover back property which the Woolen Company had received, as the bill alleged, pursuant to a scheme entered into to hinder, delay and defraud creditors, which scheme is set forth in full, and asserts the mingling of the bankrupts' goods with the goods of the Woolen Company and that creditors were defrauded by reason thereof. It is not brought under the section which authorizes a trustee to avoid a preferential transfer, and no such question was involved in the trial.

If the transaction was a sale to the bankrupts, then they had a perfect right to return goods in payment of their debt, and the Woolen Company had a perfect right to receive them; and unless an action was brought against the Woolen Company to recover the goods upon the ground of a preference, and proof was submitted sufficient to justify a recovery,

the Woolen Company would not be compelled to return the goods.

If this transaction was a sale, the Woolen Company became a creditor of the bankrupts, and the bankrupts had a right to pay for the amount they owed it, in whole or in part, by returning the goods.

The recent case of

Coder vs. *Arts*, 213 U. S., 223,

shows the difference between an action to recover a preference and an action to recover upon a transaction made with intent and purpose to hinder, delay or defraud creditors.

POINT V.

The complainant's recovery in the District Court was utterly at variance with the allegations of his bill of complaint, and the judgment of said Court was properly reversed.

The gravamen of complainant's action is actual fraud. This has not been proven. There can be no inference of legal fraud, because there are no facts upon which it could be predicated.

It is difficult to determine whether the trial Judge wishes to be understood as holding that the transactions in suit constitute a sale *per se* even as between the parties, or sales only as to creditors. While allusions to legal fraud may be found in his decision, his reasoning is equally applicable to holding that even between the parties the transactions constituted sales. The Judge holds (p. 212): "It (the Woolen Company) was from the moment of delivering goods contractually entitled to recover from Horowitz the sale price

of those goods, and could not be compelled to resume possession of any of them."

And later (p. 212) he says, "I am convinced that the vice of defendants' position is that they have wrongfully *labeled* what they did." And from that point to the close of his opinion, he proceeds to demonstrate that the transactions are not consignments, as they will not stand the tests of consignments, but are *per se* sales and nothing else, and he winds up with that statement that the legal result (p. 215) of the transactions is that the Horowitzes became the vendees of the goods—not alone as to creditors, but from the inherent nature of the transactions themselves.

If this reasoning is correct, the plaintiff's bill fails, and while he may have had other remedies on other theories and upon other and proper proof to have held the Woolen Company responsible for the value of goods taken away by it, he cannot recover therefor in this action.

The intention of the parties was not to pass title out of the Woolen Company, and it is true that they "labeled" the transaction a "consignment," which we think to be correct, but conceding that it was not a consignment, it certainly was a "sale" and a "conditional sale" at that.

If conditional, title did not pass until payment. If an absolute sale, the bankrupts had the right to return the goods, and in doing so, paid a lawful debt, and are not liable for anything invoked in this action.

The formation of the Niagara Company having been held to be without actual fraud, there could be no legal one, since by its formation, and by the erection of conspicuous signs in its place of business notice was given to the world of its existence, and inquiry on the part of any creditor would have elicited its relations to the Woolen Company and the Horowitzes. Instead of aiding in any secret scheme, it called the attention of the trade to the open method in which business was being done.

Why then should creditors who do not appear to have been in any way dammified or injured by the dealings between the Woolen Company and the Horowitzes be allowed to successfully attack a scheme which was not only not intended to defraud any one—in fact, did defraud no one—and is as far from the swindling scheme charged in the bill of complaint as any honest series of transactions possibly can be?

Both upon the law and upon the facts, we submit that the complainant was not entitled to recover.

POINT VI.

The judgment and mandate of the Circuit Court of Appeals should be affirmed, with costs.

Respectfully submitted,

DANIEL P. HAYS,
Solicitor for Appellees.

DANIEL P. HAYS,
EDWIN D. HAYS,
Of Counsel.

(Also Supreme Court, U. S.,
No. 1, Oct. Term,
NOV 14 1913
JAMES D. MAHER
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 65.

CLIFFORD G. LUDVIGH, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE AND EFFECTS OF PHILLIP HOROWITZ AND JOSEPH HOROWITZ, INDIVIDUALLY AND AS CO-PARTNERS, ETC.,

Appellant,

against

THE AMERICAN WOOLEN COMPANY OF NEW YORK AND THE NIAGARA WOOLEN COMPANY,

Appellees.

REPLY BRIEF FOR THE APPELLANT.

ABRAM I. ELKUS,
GARRARD GLENN,
Counsel for Appellant.

[illegible], 49 Beekman St., New York.

IN THE

Supreme Court of the United States.

CLIFFORD G. LUDVIGH, as Trustee in Bankruptcy of the Estate and Effects of Phillip Horowitz and Joseph Horowitz, individually and as copartners, etc., Appellant, *against* THE AMERICAN WOOLEN COMPANY OF NEW YORK and the NIAGARA WOOLEN COMPANY, Appellees.	October Term, 1913, No. 55.

REPLY BRIEF FOR APPELLANT.

The brief which the appellee's counsel submit demonstrates, in spite of all the ability it manifests, the difficulty of making a good case out of bad facts. The construction of the written agreement is one thing; as to that we stand upon the view expressed by Judge HOUGH, with whom Judge LACOMBE concurred, supple-

mented by such suggestions as we were able to offer in our principal brief here. The consideration of the facts relating to the parties' conduct is the point upon which our opponents meet with even more difficulty, and of necessity; for the whole current of events is manifestly against them. They claim that the goods were merely consigned and not sold by the American to Horowitz; but how can they answer all the circumstances which show that all the parties regarded the goods as sold? They claim that the Niagara was a cash box to safeguard the American, but how can they answer all the facts which show that it never was intended to have that effect, and did not? They revive the claim that the Niagara was an independent entity, but how can they answer the facts which show that it was not so treated by any of the parties until Horowitz became bankrupt?

They have not attempted to answer these facts as a whole; they have been compelled to satisfy themselves with special instances and special details. The result is a highly tenuous argument, which cannot be convincing, for it is set against the whole current of the events which the record displays.

And, as might be expected of such an argument, it contains inadvertent errors.

In the first place, the appellee claims that while the invoices were the usual printed forms used in case of sales, yet special typewritten language is used showing that the goods were consigned instead of sold. If this was so, why was the name of the salesman written in each invoice as "*salesman—Muldoon* (the name Mul-

doon being written)." We have already called attention to this circumstance in our principal brief (p. 44), and it is not necessary to repeat what we there said.

The appellee's statement with regard to the American Company's refusal to take back goods appearing on page 11 of his brief is not sustained by the record. The appellee states that these were special goods which the American Company did not wish to consign, and therefore the appellee, before consigning them, made Horowitz guarantee the Woolen Company from loss in case they were not sold and it had to take back the goods. In other words, the appellee claims that this was a mere special instance of a sale. On page 24 of his brief, however, the appellee weakens this claim by saying that the refusal of the American Company was "at the most an attempt on the part of an agent of the Woolen Company to force the Niagara Company to keep and endeavor to sell the goods in question. It cannot outweigh the positive intention of the parties as expressed in their written agreement and by their course of conduct." The appellee evidently felt impelled to make this qualification, because *there is nothing in the record to justify the assertion that these goods were the subject of a special contract of sale outside of the usual agreement.* Page 148 of the record, to which he refers, does not justify this claim. On the contrary, the guarantee of Horowitz (Plaintiff's Exhibit 12) there set out refers to the goods as "consigned to Horowitz." Also on page 140 the American Company in its letter (Plaintiff's Exhibit 13) refers to the goods as "consigned to us." *In other*

words, these goods were "consigned" just like all the others were; there was nothing special in the circumstance.

Nor is the appellee's argument with regard to the discounts very convincing. The appellee claims (brief, p. 11) that the discounts were to depend upon the time within which the Niagara Company turned over the money to the American Company, whereas had the contract been one of sale the discount would have been figured from the time of delivery of the goods and not from the time of the sale (see also pp. 17 and 21 of appellee's brief).

The best answer to this is to be found in the memorandum made by an officer of the American Woolen Company (Plaintiff's Exhibit 16) which states "*sales* to be made on terms of 8-60 days; we accept payment on account of sales on average due date" (Rec., p. 150). *Thus in the very mention of the discounts, the parties considered that they related to sales to the Horowitzes, not consignments.*

The fact that the American figured the discounts from the date that the Horowitz's re-sold the goods, instead of the date when they received them, is easily explained by the fact that goods were often charged to the Horowitz's before they received them (Rec., pp. 136–138). As Hartough testifies, "the merchandise was in Philip Horowitz's place, but some of it was also kept in the American Woolen Company's warehouse until it was required and then it was taken out" (Rec., p. 136). Consequently a fairer method in the main of figuring the discounts would be as arranged. It must also be noted

that this sort of arrangement would stimulate the Horowitzes to do what the agreement permitted, *pay the invoice prices in advance of resale;* which, of course, is inconsistent with a consignment arrangement.

The appellee does not in effect deny that the bookkeeper and auditors acting for the American depended upon the Horowitzes for their information, but offers the suggestion that these officials "must necessarily have seen what was going on and have had general first hand knowledge of the transaction" (Brief, p. 12). The answer to that is afforded by the testimony of Mr. Dauber and Mr. Hartough, to which we refer in our brief (pp. 67, 78, 19-23). *They testify that they did not have first hand knowledge.*

The appellee makes much (Brief, pp. 13-15) of Judge Hough's language that there was no departure from the letter or spirit of the written agreements. *But the appellee does not refer to the learned Judge's language that the letter and spirit of the agreements, or as he describes it, "the whole and avowed meaning and intent of the arrangement," was "not to consign goods to the Niagara Company, but to enable Horowitz & Son to sell goods at their own prices without owning them"* (Rec., p. 214).

The appellee refers to Horowitz's testimony that "I wasn't supposed to sell; I wouldn't sell under cost" (Brief, p. 29). Horowitz was then describing his conversation with Murphy of the Woolen Company which lead up to the new agreements. Previously he had testified:

"Mr. Murphy said I was to get the goods at the

price I bought same as before and sell them for any price I pleased and that whatever I would get above the price-list price, that would be my profit."

Then, on being asked what was said about the contingency of his selling below cost he answered: "I wasn't supposed to sell; I wouldn't sell under cost" (Rec., p. 68).

That simply meant that the idea of selling below cost never entered the minds of either Horowitz or Murphy at the time of the discussion, because both were thinking of making profits; but it is quite another thing to say that by this conversation an agreement was made binding the Horowitzs not to sell below cost. Of course, ordinarily they would not do this for their own interest. But that does not lead to the conclusion that they agreed not to do it. There was nothing in the written agreement which followed this conversation prohibiting them from selling below cost, as we have shown in our main brief; there is nothing to show that they ever otherwise agreed to that effect.

In the attempt to show that the "Niagara Cash Box" arrangement safeguarded the Woolen Company, counsel are inconsistent. They claim that the proceeds of sale when paid into the Niagara Company's bank account were so situated that neither the Horowitzs nor the Niagara Company would use them without committing a crime, and counsel say that these moneys were held by the Niagara "for the Woolen Company." That theory, however, is inconsistent with the suit which the Niagara Company brought against Horowitz, the judgment roll in which appears, over our objection

and exception (Rec., pp. 130-140) as Exhibit "Y." (Rec., p. 179) in this action. There the Referee finds, at the plaintiff's instance, that the Niagara received checks "for goods sold and delivered *by it*" (Rec., p. 185), *and that the money "belonged to the Niagara Woolen Company"* (Eleventh finding, Rec., p. 187). *Certainly the money did not belong to the American. As we have shown in our Main Brief, the American could never draw any money without the counter signature of Joseph Horowitz. The American thus could not use the money without either getting Horowitz signature or forging it.*

The appellee also errs in stating that Judge Hough found that the $1,200 a month which Horowitz received was paid out of the profits as long as it was paid (p. 44-5). Judge Hough's opinion does not admit of this interpretation. Judge Hough said just what the evidence showed, and no more, that no dividends were ever paid on the Niagara stock, nor were any earnings of the company shown *in excess* of $1,200 (Rec., p. 209). *Nor were any earnings ever shown at all, and the so-called treasurer of the company, Dazber, testified that he cannot tell from the Niagara's books, even at the present day, how much was owing to the American Woolen Company* (Rec., p. 115). It must be remembered that the theoretical agreement with Horowitz was that he was to be paid $1,200 a month to be charged against his share of the profits, and that Horowitz owned all but a nominal amount of the Niagara's capital stock. If the agreement had been seriously intended, then it was to the interest of Horowitz to have the Niagara from

time to time declare a dividend so as to offset the profits thus demonstrated against his indebtedness caused by his $1,200 a month drawings. *That would have been the most obvious way of showing that Horowitz in fact drew only profits, and that the entire amount which he drew was justified by an equal amount of profits coming to him.* But nothing of the sort was ever done, and the books of the Niagara, so far from showing that Horowitz was ever entitled to any profits whether in excess of $1,200 or below it in any month, do not show anything on the subject.

And finally the appellees point as to the alleged variance between the allegations of the bill and the brief is not well founded. On the contrary, the Judge of the District Court found that "the bill is broad enough to fairly cover the claim now put forward by the trustee" (Rec., p. 211). The Court of Appeals agreed with him, construing the bill as "praying that the agreements of November 25, 1902, above mentioned and the removal of the said goods might be declared void under the bankruptcy act as in fraud of the creditors of Horowitz & Son, and that the defendants might be decreed to deliver the woolens removed by the American Woolen Company or their value," etc. (Rec., p. 225).

In view of this agreement of the lower courts, we did not deem it necessary to encumber our main brief with any extended discussion of the point now raised. The following is now submitted for this Court's assistance, if required:

The bill charges fraud, which is of the class known as constructive or presumptive fraud. The courts be-

low have considered that the fraud charged by the bill is constructive fraud, which, as Pomeroy has said, includes all cases of conveyances in fraud of creditors (Pomeroy Equity Jurisprudence, secs. 968, 922). Taking any aspect of the bill that you please, you arrive at the same result. If, as we contend, the transaction in effect amounted to a sale of the goods to Horowitz by the American Company, yet the American Company attempted to fasten a lien upon the goods in the event of Horowitz's bankruptcy by means of the Niagara's fictitious existence, and this lien as against the creditors of Horowitz, is fraudulent. If the transaction is considered as amounting to a conditional sale of the goods to the Horowitzes, then the freedom allowed Horowitz in dealing with the goods is, as against his creditors, fraudulent.

So far as the outside public was concerned the evidence is uncontradicted that the customers to whom the Niagara goods were sold "*knew they were buying from Philip Horowitz & Son*" (Record, p. 75).

It is conceded on the record that none of the agreements were ever filed or recorded in any public office (Rec., p. 42), and if they had been it would have made no difference, for, as this Court has said:

> "It is idle to say that a resort to the record would have shown the existence of the mortgage, for men get credit for what they apparently own and possess."
>
> *Robinson* vs. *Elliott* (22 Wall., 513, 525).

While, as Judge Hough says, the presence of the

Niagara Company at the Horowitz store was advertised by a sign, that circumstance cannot remove the element of fraud. In a precisely similar case, where the sign of the alleged owner appeared on the door together with th sign of the alleged consignee, Judge Holt held:

> *"I do not think that these signs indicate with any clearness who was the tenant or actual occupant of the premises. If there were any distinction to be drawn I would infer that it might be a little in favor of Radon & Co., who had occupied the premises before. * * * I think the signs are entitled to very little weight as evidence in determining who was in possession and occupancy of the premises, and they certainly do not affirmatively establish that Schefer, Schram & Vogel were in possession of the premises and that Radon & Co. were not."*
>
> *Ryttenberg* vs. *Schefer* (131 Fed., 313, 320).

It having been shown that the Horowitzes were actually in control of the goods on their premises, it was not necessary for the plaintiff to show by the testimony of each creditor that he in fact relied on the Horowitzes being the owners of the goods. This, of course, would not be necessary if, as we claim, the arrangement between the parties amounted to a sale of the goods to the Horowitzes, despite the fraudulent creation of the Niagara Company. Nor would it be necessary if this transaction is viewed as a case of conditional sale, because the freedom allowed the Horowitzes, as we have shown in the fourth point of our brief, affected, as

matter of law, a constructive fraud upon the Horowitz creditors. The point is well put in one of the cases cited by us (*Edgell* vs. *Hart*, 9 N. Y., 213), where the Court said that the manifest tendency of such arrangement was to defraud creditors by giving to the mortgagor a false credit. And as said in *In re Garcewich* (115 Fed., 87), also cited by us, such a transaction "will be presumed fraudulent as against purchasers and creditors." As has been said by the Circuit Court of Appeals in the Fourth Circuit:

> "It is not necessary that it should appear that the creditor became such on the strength of the possession by the debtor of the property attached or levied on in view of the presumption of absolute ownership arising from such possession."
>
> *H. K. Porter Co.* vs. *Boyd* (171 Fed., 305).

As is said in the Eighth Circuit:

> "The inevitable tendency was to mislead and deceive, and the presumption must be indulged in that they were misled to their injury."
>
> *In re* BOTHE (173 Fed., 597).

The same principle has been expressed by Mr. Justice Bradley of this Court, both here and on circuit (*Casey* vs. *Cavaroc*, 96 U. S., 467); *Frelinghuysen* vs. *Nugent*, 36 Fed., 229).

The appellees must be held to have intended this result, because, as is emphatically shown by the case of *Coleman* vs. *Burr* (93 N. Y., 17), cited in our main brief,

men always must be held to have intended the natural consequence of their acts, no matter what their actual intent was.

Dated November 8, 1913.

Respectfully submitted,

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